

**United States Department of Labor
Employees' Compensation Appeals Board**

M.L., Appellant

and

**U.S. POSTAL SERVICE, NEW DORP POST
OFFICE, Staten Island, NY, Employer**

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**Docket No. 19-0784
Issued: September 19, 2019**

Appearances:

*Robert D. Campbell, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 27, 2019 appellant, through counsel, filed a timely appeal from a January 22, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that counsel did not appeal from the December 17, 2018 OWCP decision, which denied expansion of the acceptance of appellant's claim to include additional right shoulder and arm conditions as causally related to the accepted June 9, 2017 employment injury. Therefore, the Board has not exercised jurisdiction over that decision. *See* 20 C.F.R. § 501.3(c)(4).

³ The Board notes that counsel submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,645.29 for the period July 25 through November 10, 2017, for which she was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 9, 2017 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for a right shoulder and arm injury that she allegedly sustained on that date while in the performance of duty. She claimed that she impacted her right shoulder and arm on the interior of the mail truck during a motor vehicle accident. Appellant stopped work on that date and received continuation of pay beginning June 10, 2017. On the reverse side of the claim form, the employing establishment noted that appellant worked part time for four hours per day, five days per week.⁴

On July 25, 2017 OWCP accepted appellant's claim for right shoulder sprain. Appellant received wage-loss compensation benefits for temporary total disability beginning July 25, 2017 based on a weekly pay rate of \$1,151.13 and working 40 hours per week.

In a letter dated January 11, 2018, OWCP requested additional information from the employing establishment regarding appellant's gross earnings for one year prior to June 9, 2017. It also requested that the employing establishment confirm the kind of appointment that she had and whether she worked full time, part time, or intermittently.

In a March 19, 2018 telephone memorandum (Form CA-110) note, appellant informed OWCP that from April 2016 to June 9, 2017 she worked four hours per day.

On March 26, 2018 the employing establishment responded to the January 11, 2018 letter. It indicated that appellant's gross pay for the year immediately prior to June 9, 2017 was \$34,258.00 and her base weekly pay rate was \$658.81. The employing establishment reached this amount by dividing \$34,258.00 by 52 to equal \$658.81. It noted that appellant worked less than eight hours per day prior to the June 9, 2017 employment injury due to an unrelated condition. The employing establishment explained that although appellant was employed as a full-time letter carrier, she had not worked her full-time job for the last year.

On March 30, 2018 OWCP adjusted appellant's wage-loss compensation benefits beginning November 11, 2017 based on a weekly pay rate of \$658.81 for working 20 hours per week.

On June 11, 2018 an overpayment was identified in appellant's case because she received wage-loss compensation benefits in the amount of \$12,129.66 for the period July 25 to

⁴ The record reflects that at the time of the injury, appellant was working four hours per day due to a previous knee injury.

November 10, 2017 when she should have received \$6,484.37. OWCP subtracted \$6,484.37 from \$12,129.66 for a total overpayment of \$5,645.29.⁵

In November 2018 OWCP expanded acceptance of the claim to include temporary aggravation of right shoulder adhesive capsulitis.

On December 11, 2018 appellant returned to part-time, limited-duty work for four hours per day.

In a December 19, 2018 letter, A.W., an injury compensation specialist for the employing establishment, indicated that at the time of the June 9, 2017 employment injury appellant had been working four hours per day. She related that from July 25 through November 10, 2017 appellant was paid wage-loss compensation for 40 hours per week. A.W. requested that OWCP review the file and declare an overpayment of compensation for the period July 25 to November 10, 2017.

On December 20, 2018 OWCP advised appellant of its preliminary determination that she had received an overpayment of wage-loss compensation in the amount of \$5,645.29 because compensation was paid at an inaccurate pay rate for the period July 25 to November 10, 2017. It calculated the overpayment by subtracting the total amount it should have paid her using the proper pay rate from the date of injury from the amount it paid her using the incorrect pay rate. OWCP found that for the period July 25 to November 10, 2017, it paid her \$12,129.66 based on working 40 hours per week, when it should have paid her \$6,484.37 based on working 20 hours per week, which resulted in the creation of an overpayment of compensation in the amount of \$5,645.29. It further notified appellant of its preliminary determination that she was without fault in the creation of the overpayment of compensation. OWCP requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecolement hearing.

OWCP did not receive a completed Form OWCP-20 or additional documents regarding appellant's alleged overpayment.

By decision dated January 22, 2019, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$5,645.29 for the period July 25 through November 10, 2017 because she was paid at an incorrect pay rate. The claims examiner further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because she had not submitted evidence in response to the December 20, 2018 preliminary determination to support that the overpayment should be waived.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

⁵ OWCP provided payment documents supporting that appellant received \$12,129.66 for the period July 25 to November 10, 2017. It also provided calculations showing that appellant was only entitled to receive \$6,484.37 for this period based on the proper weekly pay rate of \$658.81.

performance of duty.⁶ Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins, or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.⁷

Once the proper time period is determined, section 8114(d) provides a specific methodology for determining pay rate: (1) if the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay -- (a) was fixed, the average annual earnings are the annual rate of pay.”⁸

OWCP’s Federal (FECA) Procedure Manual further provides that the claims examiner should determine the basis of payment under 5 U.S.C. § 8114 and whether the claimant is a full-time, part-time, temporary, seasonal, casual, *etc.* worker.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,645.29 for the period July 25 through November 10, 2017, for which she was without fault.

Beginning July 25, 2017, OWCP paid appellant compensation for total disability using the weekly pay rate of \$1,151.13. When appellant’s June 9, 2017 employment injury occurred, however, she was only working four hours per day, five days per week. The employing establishment indicated that the correct date-of-injury weekly pay rate should have been \$658.81 because appellant worked for 20 hours per week.¹⁰ As appellant received compensation based on the incorrect date-of-injury weekly pay rate for the period July 25 through November 10, 2017, she received an overpayment of compensation.¹¹

The Board further notes that the record contains evidence which shows that appellant received \$12,129.66 in compensation for the period July 25 to November 10, 2017 when she was only entitled to receive \$6,484.37. Therefore, OWCP properly determined that she received an overpayment of compensation in the amount of \$5,645.29.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8101(4).

⁸ *Id.* at § 8114(d)(1)(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.2(a) (March 2011).

¹⁰ OWCP noted that \$34,258.00 divided by 52 weeks equals \$658.81.

¹¹ *See N.C.*, Docket No. 18-1070 (issued January 9, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹² *See P.J.*, Docket No. 18-0248 (issued August 14, 2018).

recovery would defeat the purpose of FECA or would be against equity and good conscience.¹³ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁴ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁵ Additionally recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁶

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$5,645.29 overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ Appellant, however, had the responsibility to provide financial information to OWCP,¹⁹ and did not do so.

In its preliminary determination dated December 20, 2018, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire (Form OWCP-20)

¹³ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437.

¹⁴ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁵ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (June 2009).

¹⁶ *Id.* at § 10.437(a)(b).

¹⁷ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁸ *Supra* note 11.

¹⁹ *Supra* note 15.

and financial information. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant did not submit a completed overpayment recovery questionnaire or otherwise submit financial information supporting her income and expenses within the defined period. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.²⁰

Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,645.29 for the period July 25 through November 10, 2017, for which she was without fault. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁰ See *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

²¹ *Id.*